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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME ALFONSO MATOS,

Defendant and Appellant.

G040753

(Super. Ct. No. FSB054593)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County,
Arthur Harrison, Judge. Affirmed.

Gordon S. Brownell, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, and Marissa Bejarano, Deputy
Attorney General, for Plaintiff and Respondent.

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INTRODUCTION

A jury found defendant Jaime Alfonso Matos guilty of murder and attempted murder, and found true several firearm and gang allegation enhancements. We conclude that although the trial court erred by failing to instruct the jury to consider defendant's oral admissions with caution, the error was harmless. We therefore affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On February 9, 2006, about 8:00 p.m., Jose Orozco and three friends were confronted by three young Hispanic males near the corner of 14th Street and Vine Street in Highland. The Hispanic males asked Orozco and his friends, "[w]here are you from?" and demanded money. One of the three Hispanic males pulled out a gun and shot Orozco in the chest. Orozco died as a result of his wounds. The shooter and his companions drove off in a white car.

Shortly thereafter, Rodney Anthony Morris and two of his cousins were walking near Pacific High School in San Bernardino, when a white car pulled up and stopped in front of them. Three Hispanic males got out of the car, and asked the cousins if they were members of a gang. The cousins replied they "don't bang" and they were from Los Angeles, and the Hispanic males began shooting. Morris was shot in the leg.

Before trial, defendant was identified by eyewitnesses as Orozco's shooter. The only cartridge casing found at the scene of Morris's shooting was determined to have been fired from the same gun that fired a cartridge casing found beside Orozco's body. Defendant admitted to being a member of the Colonial Trece criminal street gang when he was arrested.

Jonas Vargas was charged along with defendant. Before trial, Vargas entered a plea agreement, and testified against defendant. Vargas admitted he was a member of the Colonial Trece gang. On February 9, 2006, Vargas picked up defendant and another Colonial Trece gang member in Vargas's white car. They planned to

“pocket check” people, meaning they would intimidate them into handing over what was in their pockets. Defendant told Vargas to stop the car near 14th Street and Vine Street. Defendant, Vargas, and the other man got out of the car and approached a group of four or five men. Defendant asked, “[w]here are you guys from?” and told them to “[g]ive us what you got.” Vargas punched one of the men in the face, and, at the same time, heard a gunshot; he did not see who fired the shot. When they were back in the car, Vargas asked defendant what happened; defendant replied, “[h]e had something. He had something, so I had to shoot him.” Defendant told Vargas that he thought he had shot the man in the chest.

Defendant again told Vargas to stop the car as they drove past Pacific High School. As two or three African-American men walked by, defendant got out of the car and asked them where they were from. Vargas saw defendant pull out the gun and shoot at one of the men.

Defendant was convicted of first degree murder (Pen. Code, § 187, subd. (a)) and attempted willful, deliberate, premeditated murder (*id.*, §§ 187, subd. (a), 664). The jury found true the following allegations as to both the murder and attempted murder charges: personal and intentional discharge of a firearm proximately causing great bodily injury or death (*id.*, § 12022.53, subds. (d) & (e)(1)); personal and intentional discharge of a firearm (*id.*, § 12022.53, subds. (c) & (e)(1)); personal use of a firearm (*id.*, § 12022.53, subds. (b) & (e)(1)); and that the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang (*id.*, § 186.22, subd. (b)(1)(C)).

The trial court sentenced defendant to a total of 90 years to life in prison. The court sentenced defendant to 25 years to life for the murder count, with a consecutive 25-year-to-life sentence for the personal and intentional discharge of a firearm causing death or great bodily injury enhancement; and 15 years to life for attempted murder, imposed consecutively to the murder count, with a consecutive 25-year-to-life sentence

for the personal and intentional discharge of a firearm causing death or great bodily injury enhancement.

We appointed counsel to represent defendant on appeal. Appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), setting forth the facts of the case and requesting that we review the entire record. Pursuant to *Anders v. California* (1967) 386 U.S. 738, appointed counsel suggested we consider as possible issues whether the trial court erred in instructing the jury regarding defendant's out-of-court statement, and whether there was sufficient evidence to support defendant's convictions and a great bodily injury enhancement.

On April 28, 2009, this court provided defendant with 30 days to file written argument on his own behalf. That period of time passed, and we received no communication from him.

We examined the entire record and counsel's *Wende* brief, and found two arguable issues: (1) whether the trial court's failure to instruct the jury with the second paragraph of CALCRIM No. 358 constituted error; and (2) whether any error was harmless. We therefore invited defendant and the Attorney General to file supplemental letter briefs on the identified issues, which they did.

DISCUSSION

Based on Vargas's testimony that defendant stated he thought he shot Orozco in the chest, the trial court instructed the jury with CALCRIM No. 358, as follows: "You have heard evidence that the defendant made oral statements before the trial. You must decide whether or not the defendant made any such statement in whole or in part. If you decide that the defendant made such a statement, consider the statement along with all of the other evidence in reaching your verdict. It is up to you to decide how much importance to give to such a statement." The trial court did not instruct the jury with the second paragraph of CALCRIM No. 358, which reads: "Consider with

caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.” The court had a sua sponte duty to give the second paragraph of the instruction, because defendant’s incriminating out-of-court statement was made orally to Vargas. (*People v. Beagle* (1972) 6 Cal.3d 441, 455.) The trial court erred in failing to give the second paragraph of this instruction.

The error was not prejudicial, however, because it is not reasonably probable that a result more favorable to defendant would have been reached had the entire instruction been given. (*People v. Beagle, supra*, 6 Cal.3d at pp. 455-456; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Independent of defendant’s incriminatory statement to Vargas, eyewitnesses testified defendant shot Orozco, forensic evidence connected the two shootings, and Vargas testified he witnessed defendant shoot Morris.

Additionally, the California Supreme Court has held: “Where there was no . . . conflict in the evidence, but simply a denial by the defendant that he made the statements attributed to him, we have found failure to give the cautionary instruction [the second paragraph of CALCRIM No. 358] harmless.” (*People v. Dickey* (2005) 35 Cal.4th 884, 906; see *People v. Bunyard* (1988) 45 Cal.3d 1189, 1225-1226.) Having reviewed the record, we find no “‘conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately. [Citations.]’ [Citation.]” (*People v. Dickey, supra*, 35 Cal.4th at p. 905.) Therefore, for all these reasons, the trial court’s instructional error was harmless.

In counsel’s *Wende* brief, two additional issues were identified for our consideration, pursuant to *Anders v. California, supra*, 386 U.S. 738: (1) the sufficiency of the evidence supporting defendant’s convictions for murder and attempted murder, and (2) the sufficiency of the evidence of great bodily injury supporting the firearm enhancements under Penal Code section 12022.53, subdivisions (d) and (e)(1). As to the first issue, Vargas’s accomplice testimony was amply corroborated by eyewitness testimony that defendant shot Orozco, forensic evidence linking the gun used at Orozco’s

murder to the shooting of Morris, and a gang expert's testimony about gang culture. As to the second issue, "great bodily injury" means "a significant or substantial physical injury." (Pen. Code, § 12022.7, subd. (f).) There was substantial evidence that Morris suffered a significant or substantial physical injury. Morris was shot in the leg, treated at a hospital, and had to use crutches for three weeks.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.